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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION 4

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH LOPEZ JR., Defendant and Appellant.	A129664 (Sonoma County Super. Ct. No. SCR538745)

Around midnight on December 2, 2006, defendant Joseph Lopez, Jr. (Lopez), his father Joseph Lopez, Sr. (Lopez, Sr.), and three codefendants encountered Matthew Toste and two female companions in a parking garage next to Club 7 in downtown Santa Rosa. Lopez and his companions made sexually inappropriate comments to the women, pushed and surrounded them, and grabbed them inappropriately. When Toste confronted the men, Lopez, Sr. attempted to punch Toste but missed. Toste punched Lopez, Sr., knocking him to the ground. Lopez then shot Toste twice. Lopez fled the scene and Toste died from his wounds.

At trial, Lopez did not deny that he shot Toste. Instead, he testified he had been drinking heavily in the hours leading up to the shooting and he thought he was acting in defense of his father. Lopez offered the testimony of an intoxication expert, and asserted theories of heat of passion and imperfect self-defense voluntary manslaughter. The jury found Lopez guilty of second degree murder, unlawful possession of a semi-automatic firearm, and participation in a criminal street gang. The trial court sentenced Lopez to a total term of 43 years 8 months to life in prison.

On appeal, Lopez alleges various errors regarding the trial court's evidentiary rulings and jury instructions with respect to his intoxication evidence, the testimony of his intoxication expert, and references to that evidence during opening and closing statements. He also argues there was insufficient evidence to sustain the criminal street gang charge. For the reasons that follow, we will affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. *Overview of the Offense*

On December 2, 2006, Lopez and his father, Lopez, Sr., had a barbeque at their house. The barbeque was attended by Lopez's cousins Raul Lopez-Granados and Jessie Gonzalez and his friends Nicholas Mejia and Paul Whiterock. Lopez woke up around noon and had two shots of tequila before taking a shower. He continued to drink tequila throughout the day. He drank a "bottle of 1800 [tequila] by [himself]" as well as shots from an additional bottle.

Around midnight, the barbeque broke up. Gonzales, Mejia, Whiterock, Lopez-Granados, Lopez, and Lopez, Sr., drove to Club 7 in downtown Santa Rosa and parked in the Seventh Street parking garage. Whiterock drove Gonzales and Lopez, Sr., while the other men rode in Mejia's pickup truck. Whiterock parked on the first level of the garage.

Meanwhile, around 11:00 or 11:30 p.m. that night, Kelly Griffin, Matthew Toste, Kim Barragan, and Chris Barragan left a company Christmas party at the Hyatt Hotel in downtown Santa Rosa and drove to the Seventh Street garage to go dancing at Club 7. All four rode in the Barragans' Honda Accord. They entered the garage at the Seventh Street entrance and parked toward the back of the garage on the first level. Chris Barragan stayed behind at the car to change his clothes, while Toste, Griffin, and Kim Barragan (Barragan) walked ahead toward the club.

Toste walked somewhat ahead of Griffin and Barragan as they headed toward the club. As they walked, they encountered Lopez, Lopez, Sr., Gonzales, Mejia, and Lopez-Granados. Whiterock stood somewhat apart from the other men. The men (not including Whiterock) began making "cat calls" and sexually inappropriate remarks to the two

women. After Toste passed by the men, they came towards Griffin and Barragan and "forcefully" surrounded them. Griffin and Barragan were walking arm in arm and the men pushed them to unlock their arms and forced them to walk single file. Lopez, Sr. came toward Barragan and said, "Oh, baby, you're fine. Come with me." He grabbed her hair and her buttocks. Griffin identified Lopez in court as one of the men who was "in [her] face" pushing her and Barragan apart and making vulgar comments.

As the men surrounded Griffin and Barragan, Toste turned and walked back toward the women, telling the men to leave the women alone. The men shifted their attention to Toste, throwing their arms in the air and challenging him. They made comments such as, "You want a piece of me, white boy?" and called him "gringo." All five of the men were making challenging comments and gestures toward Toste. Barragan then attempted to get in between the men and Toste.

Lopez, Sr. then threw Barragan to the ground to get to Toste. Lopez, Sr. ran about 10 feet toward Toste and swung his fist at Toste's face. Toste dodged the blow and punched Lopez, Sr., who fell to the ground. After Griffin helped Barragan to her feet, Lopez ran behind her and came very close to his father. Lopez then fired his gun at Toste several times. Toste was hit twice, and Gonzalez and Mejia were also both shot in the leg. Lopez and Whiterock fled the scene. Toste died of his wounds.

II. *Procedural Background*

On January 6, 2010, an amended indictment was filed charging Lopez, Lopez, Sr., Whiterock, Mejia, and Lopez-Granados with the murder of Matthew Toste (Pen. Code, § 187, subd. (a))[1] (count 1) and with participation in a criminal street gang (§ 186.22, subd. (a)) (count 2). Lopez was separately charged with the unlawful possession of a semi-automatic firearm (§ 12021, subd. (e)) (count 3). Finally, Lopez, Sr., Whiterock, Mejia, and Lopez-Granados were charged with being accessories after the fact to the murder (§ 32) (count 4). The indictment alleged in connection with count 1 that Lopez and his codefendants personally and intentionally discharged a firearm (§ 12022.53,

[1] All subsequent statutory references are to the Penal Code.

subds. (b), (c), (d) & (e)(1)) and in connection with counts 1, 3, & 4 that Lopez and his codefendants committed the offenses to benefit a criminal gang (§ 186.22, subds. (b)(1), (b)(5)). Lopez, Sr., Mejia, and Lopez-Granados pleaded no contest to counts 2 and 4 and the remaining counts were dismissed as to those co-defendants. Lopez and Whiterock went to trial.

III. *Trial Testimony*

At trial, Lopez did not dispute that he shot Toste. The prosecution's theory of the case was that Lopez and his companions were associates or members of the Norteño gang, and that Lopez intentionally killed Toste for the gang's benefit. Kim Barragan, Griffin, and Gonzalez, among others, testified on behalf of the prosecution.[2] Santa Rosa police detective Josh Ludtke and retired police officer George Collord testified as the prosecution's gang experts. The defense focused on Lopez's intoxication and his alleged perception that Toste had just shot his father to argue that he was only guilty of voluntary or involuntary manslaughter.[3] Lopez testified on his own behalf. Dr. Stephen Pittel testified for the defense as an expert on alcohol intoxication, and Dr. Rahn Minagawa testified for the defense as an expert on gang culture.

A. Officer Collord's Testimony

Retired police officer George Collord testified as a gang expert for the prosecution. Collord was asked a series of hypothetical questions based on the facts of the shooting. He opined that a gang member's possession and display a firearm in public benefits the gang because it conveys strength and willingness to engage in violence, which can cause fear and intimidation. Collord was asked a hypothetical involving a group of gang members that begins to harass another group of strangers in a public place, is asked to stop by a member of that group, and then kills that group member. Collord opined that the killing and the harassment could benefit the gang by demonstrating their "power and dominance in a particular area," and by showing they are "capable of a

[2] Gonzalez testified pursuant to a grant of immunity.

[3] The jury was instructed on voluntary and involuntary manslaughter as lesser included offenses with respect to count 1.

supreme act of violence in the face of opposition to the gang" and "capable of standing up to anyone . . . who would challenge or be a threat to the dominance of the gang." Collord testified that one gang member coming to another's aid when attacked would benefit the gang, and to fail to do so would cause the gang member to "lose credibility, face, stature, standing within the gang."

B. Lopez's Testimony

Lopez testified on his own behalf as follows. Lopez was 18 years old on December 2, 2006. On that day, he woke up between 12:00 and 1:00 p.m. and had two shots of tequila before taking a shower. He continued to drink tequila throughout the day, ultimately drinking a bottle of tequila by himself and drinking shots from an additional bottle. By the time the barbeque ended around midnight, Lopez was "really drunk" and "blacking out," and did not remember leaving the house.

Lopez testified, "I remember being in the back of a car. And the next thing I remember was I was standing in the parking garage." The first thing Lopez recalled was hearing "noises off to [his] right." Lopez did not remember harassing Griffin and Barragan with his companions, Toste telling them to stop, or his father grabbing or throwing Barragan to the ground. He could hear music from the club and people yelling. Lopez saw his father about 30 to 40 feet away and "some girls off to the left of him." He then heard a loud "crack" or "popping noise" which he thought was a gunshot, and saw his father fall to the ground.

Lopez thought his father had been shot, and he started "running pretty fast" in his father's direction with his gun in his hand. Lopez saw Toste "standing in front of [his] dad, leaning forward, but he had his hand out . . . like he was pointing a gun at [his] dad." Lopez testified his intention as he ran was to "do what [he] could do to protect [his] dad." Lopez shot Toste from a couple feet away. Lopez fired the gun because "[he] didn't want this guy to hurt [his] dad." After the shooting, Lopez "took off running." Lopez did not remember how he got home.

C. Dr. Pittel's Testimony

Dr. Stephen Pittel, a psychologist specializing in the effects of drugs and alcohol, testified as an expert for the defense. In forming his opinion, Dr. Pittel reviewed police reports, grand jury testimony, witness statements, autopsy reports, and reports prepared by the defense investigator. Dr. Pittel also interviewed Lopez and heard his testimony at trial.

Dr. Pittel testified that as a person drinks, certain predictable effects occur and increase as more alcohol is consumed. The first effect is the inability to divide one's attention, meaning the individual can become preoccupied or fixated on something. Intoxication also affects the ability to make reasonable judgments, form conclusions, anticipate the consequences of behavior, or plan and premeditate activity. It causes "disinhibition," meaning a reduction in the brain's ability to inhibit emotional responses. Finally, alcohol consumption affects memory and can result in "blackouts" in which the individual experiences a period of memory loss, with some of the memories returning over time in a "fragmented form." Dr. Pittel was then asked the following hypothetical:

"Assume an 18-year-old male, who was drinking heavily, has been drinking heavily for five or six years, more recently within the last five or six months drinking hard liquor on a regular basis. Assume that this 18-year-old has a history of blackouts; and on the day in question of an incident I'm going to describe, that he was perceived by others to be intoxicated as early as noon that same day; he had been drinking throughout the afternoon and the evening until he left . . . his house; that he was drinking a full bottle of tequila 1800 and shared another bottle of tequila 1800. Assume further that he was driven to a location by another person and he was in the backseat. Assume further that he has few or no memories of the trip; that he remembers being—getting out of the car, hearing loud music, hearing yelling, and heard what he believed to be a gunshot and saw his father lying on the ground in a parking garage. Assume further that he runs to his father's aid, and he sees a person standing over his father with what he thought to be a gun; that he passes a relative of his and does not recognize him; and that he shoots the person who is standing over his father; that he runs out of the garage parking structure.

Assume further that he returns home later and has no memory of how he got home; that he falls asleep at home and awakens—and is awakened by the police. [¶] Now, assuming all these facts, do you have an opinion of whether this person was under the influence of alcohol when he fired the weapon."

Dr. Pittel opined the person would be under the influence of alcohol at the time of the shooting. Dr. Pittel explained the drinking as described would have "impaired his ability to perceive accurately what was going on." He also noted it was likely an intoxicated person, seeing his father lying on the ground and another man standing over him, would act impulsively. According to Dr. Pittel, the hypothetical had "all of the major elements of intoxication," including "inability to divide attention, which accounts for his fixation," "we may or may not have a misperception of the harm that had been done to his father or whether a gunshot caused that harm," and the "impulsivity or unreasoned activity of shooting somebody, which is indicative of the lack of judgment, the inability to anticipate consequences, [and] the inability to weigh the risks and benefits of your behaviors." Dr. Pittel concluded that together with the blackout, "it's a classical scenario of alcoholic intoxication."

D. The Verdict

On April 2, 2010, the jury acquitted Lopez of first degree murder but found him guilty of second degree murder (count 1). The jury also convicted Lopez of active participation in a criminal street gang (count 2) and unlawful possession of a semi-automatic firearm (count 3). Whiterock was found not guilty of being an accessory after the fact to the murder (count 4). The jury found the firearm discharge enhancement allegation true in connection with count 1, but found the gang enhancement allegations not true with respect to counts 1 and 3. The trial court sentenced Lopez to 15 years to life in prison on count 1 and a consecutive term of 25 years to life for the firearm discharge enhancement. The court also imposed a consecutive three-year upper term on count 2, and an eight-month term on count 3. The court stayed imposition of sentence on the remaining enhancements. Lopez appeals.

DISCUSSION

On appeal, Lopez argues: (1) that the trial court erred in limiting Dr. Pittel's testimony regarding Lopez's blood-alcohol content and references to his out-of-court interview with Lopez; (2) that the trial court erred in limiting how defense counsel could refer to Dr. Pittel's testimony in his opening statement; (3) that the prosecutor committed misconduct by commenting in his closing argument that there was no evidence of Lopez's blood-alcohol level; (4) that the trial court should have given or defense counsel should have requested an instruction relating the intoxication evidence to the heat of passion and imperfect self-defense theories of voluntary manslaughter; (5) that the trial court's instruction on motive improperly favored the prosecution's theory of the case and therefore violated due process; (6) that there was insufficient evidence to sustain the jury's guilty verdict on the criminal street gang charge (count 2); and (7) that cumulative effect of the above errors requires reversal. We consider each argument in turn.

I. *The Trial Court Did Not Err in Limiting Dr. Pittel's Testimony*

Lopez's first argument is that the trial court erred in ruling that Dr. Pittel could not refer to any out-of-court statements by Lopez during his testimony, and could not testify as to Lopez's actual blood-alcohol content at the time of the shooting. The prosecution moved in limine to exclude "[a]ny references by Mr. Pittel to self-serving hearsay statements made to him by defendant" and "[a]ny reference to defendant Lopez Jr.'s actual blood-alcohol level based on a lack of proper foundation." After Lopez testified regarding his drinking on the day of the incident, the trial court granted the prosecution's motion "as written." Dr. Pittel ultimately testified regarding the general effects of alcohol intoxication, and answered a lengthy hypothetical question based on Lopez's testimony at trial by opining that Lopez would have been under the influence of alcohol at the time of the incident, but did not refer to any statements made during his interview with Lopez and did not offer any opinion as to Lopez's specific blood-alcohol level.

A. Reference by Dr. Pittel to Statements Made by Lopez

On appeal, Lopez argues that an expert should be allowed to testify as to " 'all the facts' " upon which he or she bases his or her opinion, even if those facts are otherwise

inadmissible hearsay. Lopez relies on several California Supreme Court cases holding that the trial court has discretion to allow experts to testify as to the factual bases for their opinions, even where such information is otherwise inadmissible hearsay. (See *People v. Gardeley* (1996) 14 Cal.4th 605, 618 (*Gardeley*); *People v. Montiel* (1993) 5 Cal.4th 877, 918–919 (*Montiel*); *People v. Ainsworth* (1988) 45 Cal.3d 984, 1012 (*Ainsworth*).)

After this appeal was fully briefed, our Supreme Court addressed the issue of expert opinion based on inadmissible hearsay in *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). In *Sanchez*, the defendant was charged with a gang-related enhancement, and the prosecution called a gang expert to testify at trial. (*Id*. at p. 671.) The expert compiled a "gang background" on the defendant that included records of the defendant's statements to police and his contacts with the police while in the company of gang members. (*Id*. at p. 672.) The expert was then asked a lengthy hypothetical in which he was asked to assume various facts about the defendant's history and the circumstances of his arrest, and on the basis of those assumed facts the expert opined that the defendant's conduct benefitted the gang. (*Id*. at p. 673.) On appeal, the defendant argued that the expert's description of the defendant's past contacts with the police was testimonial hearsay and that its admission violated the confrontation clause. (*Id*. at p. 674.)

The Supreme Court held that facts an expert relates as the basis for his opinion are properly considered to be admitted for their truth so as to bring them within the definition of hearsay. (*Sanchez*, *supra*, 63 Cal.4th at pp. 679–684.) The court noted the hearsay rule has traditionally not barred an expert's "testimony regarding his general knowledge in his field of expertise," and held that an expert may "*rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so," but may not "relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Id*. at pp. 676, 686, original italics.) In so doing, the court disapproved its holdings to the contrary in *Gardeley*, *Ainsworth*, and *Monitel*. (*Sanchez*, at p. 686, fn. 13.) The court noted, "An examiner may ask an expert to assume a certain set of case-specific facts for which there is independent competent evidence, then ask the expert what conclusions the expert

would draw from those assumed facts." (*Id*. at pp. 676–677.) In the next part of its analysis, the court concluded that the hearsay statements at issue were testimonial within the meaning of the confrontation clause, and reversed the gang enhancements. (*Id*. at pp. 687–699).

The trial court's ruling in this case comports with the holding of *Sanchez*. The trial court granted the prosecution's motion as to "references by Mr. Pittel to self-serving hearsay statements made to him by defendant," but permitted him to testify as to any facts that were independently proven by Lopez's testimony at trial: "The hypothetical can be—you can use in the hypothetical all the testimony by [defendant] that was stated on the stand that was subject to confrontation; yes." (See *Sanchez*, *supra*, 63 Cal.4th at pp. 676–677.) The trial court also permitted Dr. Pittel to testify to the fact that he interviewed the defendant in forming his opinion. (See *id*. at p. 685 [an expert may "*rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so"].) The facts in Lopez's interview regarding his drinking on the date of the incident were clearly case-specific, and the trial court did not permit Dr. Pittel to reference those statements, as *Sanchez* forbids. (*Id*. at p. 686.) To the extent that the authorities relied on by Lopez suggest that Dr. Pittel should have been permitted to reference hearsay statements made by Lopez because they formed part of the basis of his opinion, those authorities have been disapproved by *Sanchez*. (*Id*. at p. 686, fn. 13.) We conclude there was no error.

B. Dr. Pittel's Opinion Regarding Lopez's Specific Blood-alcohol Content

Separately from its hearsay objection, the prosecution objected to Dr. Pittel's proffered testimony regarding Lopez's "actual blood-alcohol level" based on a lack of proper foundation. In particular, Dr. Pittel was prepared to opine that Lopez had a blood-alcohol level of at least 0.30 at the time of the shooting. Before Lopez testified, the trial court tentatively excluded this evidence because it was based on Lopez's hearsay statements to Dr. Pittel regarding his alcohol consumption on the day of the incident. After Lopez testified, and after Dr. Pittel testified at the section 402 hearing, the trial court again sustained the prosecution's objection to this evidence based on a lack of

foundation. (See Evid. Code, § 402.) On appeal, Lopez argues that there was a sufficient foundation for Dr. Pittel's opinion that it would have been "impossible even given his weight to have a blood-alcohol level of under [0.30]" based on testimony that Lopez was "observed to be intoxicated as early as noon" and Lopez's own testimony that he drank a "bottle" of tequila and some shots from an additional bottle over the course of the afternoon and evening.

We do not agree that the trial court abused its discretion in excluding this opinion. " 'As a general rule, a trial court has wide discretion to admit or exclude expert testimony. [Citations.] An appellate court may not interfere with the exercise of that discretion unless it is clearly abused. [Citation.]' " (*People v. Valdez* (1997) 58 Cal.App.4th 494, 506.) At the section 402 hearing, Dr. Pittel conceded that it was "impossible to estimate Mr. Lopez's blood-alcohol concentration, BAC, without detailed knowledge of how much liquor he consumed and other factors, (e.g., intervals between drinks, previous drinking history)." Dr. Pittel admitted that he did not have this information, and thus that he "had to base [his opinion] on the observations of others and on observations of Mr. Lopez's behavior." The trial court may properly have concluded that Lopez's testimony was too vague and self-serving to form the basis for Dr. Pittel's opinion. (See *People v. McWhorter* (2009) 47 Cal.4th 318, 362 ["It is settled that a trial court has wide discretion to exclude expert testimony, including hearsay testimony, that is unreliable"].)

In any event, even if the trial court erred in excluding this portion of Dr. Pittel's opinion, there was no prejudice. The jury heard Lopez's testimony regarding the amount of tequila he drank, the testimony of witnesses that he was drinking at the barbeque and appeared intoxicated, testimony from Dr. Pittel regarding the effects of alcohol intoxication in general, and Dr. Pittel's opinion that Lopez would have been intoxicated at the time of the shooting in response to a lengthy hypothetical question reflecting Lopez's testimony. Dr. Pittel's further opinion that Lopez had a blood-alcohol level of at least 0.30 would have been cumulative to this evidence and its admission would not have

made it "reasonably probable that a result more favorable to the appealing party would have been reached." (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

II. *The Trial Court Did Not Limit Defense Counsel's Opening Statement*

Lopez next argues that the trial court limited how his counsel could discuss Dr. Pittel's anticipated testimony in opening statement, thereby violating his due process rights and rendering his counsel ineffective. According to Lopez, the prosecution moved to preclude defense counsel from mentioning Dr. Pittel in opening statement, and the trial court then ruled that Dr. Pittel could "not be referenced in opening statement in specificity."[4] In response, the People argue that the trial court never limited what defense counsel could say in opening statement, but made the statements in question to notify defense counsel of its anticipated evidentiary rulings so that counsel could shape his opening statement accordingly.[5] We agree with the People.

At a pretrial hearing on February 8, 2010, the trial court outlined its anticipated rulings on certain motions in limine filed by the prosecution regarding the testimony of the defense's experts. The trial court explained it would not allow the experts to reference hearsay statements made to them by Lopez, and would be inclined to limit other aspects of the experts' testimony. The trial court stated it was giving guidance on these anticipated rulings for two reasons: (1) because counsel cannot refer to evidence in opening statement unless it is "going to be in good faith presumed to be admitted," and (2) so that defense counsel would not refer to evidence in his opening statement that would ultimately not be admitted and thereby damage his credibility with the jury. (See *Hawk v. Superior Court* (1974) 42 Cal.App.3d 108, 121 ["It is unprofessional conduct to allude to any evidence [during opening statement] unless there is a good faith and

[4] After the trial court made this statement, trial counsel stated "I am fine with the court's ruling." Because Lopez also claims ineffective assistance of counsel based on the alleged limiting of his trial counsel's opening statement, we will consider the merits of his argument.

[5] Lopez's reply brief does not respond to this argument.

reasonable basis for believing such evidence will be tendered and admitted in evidence"].)

During the hearing, the trial court on more than one occasion stated that it was not limiting what defense counsel could say in opening statement regarding the testimony of the defense's experts. For example:

"So I'm putting you on notice and truthfully just to have an even field so that you know that's where I am right now and—and now it's your call. I'm not going to block you from doing it. Doing it I mean I'm not going to block you from telling the jurors you are going to bring in a gang expert that disagrees with their expert . . . . [¶] . . . [¶] What I just said is I'm . . . not excluding you from making reference to . . . Dr. Patel [*sic*] . . . if he's going to tell us about the effects of intoxication and presuming the foundation is laid, that's fine. He can do that. I don't know what else I could do at this stage. I'm not going to block [defense counsel] from referring to these people. However, my rulings I intend it to be obvious and if there's any questions, now is the time to ask me, that you could stand in harms [*sic*] way of not getting those experts in front of the jury and thereby suffering the consequences defined as not keeping your word with the jury what you're going to put in. That's between you and you."

In his opening brief, Lopez asserts that the court ruled that Dr. Pittel could be mentioned in opening statement, but could "'[n]ot be referenced in opening statement in specificity.'" This statement was made with respect to Dr. Minagawa's proposed testimony, regarding Lopez's out-of-court statements about his "exposure to past acts of violence" and "broken and dysfunctional family," which the court indicated it would find not relevant and that therefore should "not . . . be referenced in opening statement in specificity."

In short, our review of the record shows that the trial court did not limit what defense counsel could say in opening statement, but rather gave guidance on what its evidentiary rulings would be regarding expert testimony so that defense counsel could plan his opening statement accordingly. We reject Lopez's claim of error.

III. *The Prosecutor Did Not Commit Misconduct in His Closing Statement*

Lopez argues that the prosecutor engaged in prejudicial misconduct through comments during his closing statement regarding the evidence of Lopez's intoxication, which " 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " (*Darden v. Wainwright* (1986) 477 U.S. 168, 181.) Specifically, the prosecution made the following comments on the intoxication evidence:

"Matthew Toste had a blood-alcohol level. *We don't know what Lopez, Jr.'s blood-alcohol level was or defendant Whiterock's blood-alcohol level because they fled*. What do you do with Matthew's blood-alcohol level? It makes no difference. Can a man be murdered after he had something to drink? Of course. What if he had a lot to drink? Does that make him somehow responsible for his own murder? As I said yesterday, Matthew Toste did nothing wrong . . . . [H]e was defending his cousin and he was defending his date and he was murdered for it. So what's the point of his blood-alcohol level? It doesn't matter. (Italics added.)

"What about intoxication? How does that apply to the facts of this case? There was a barbeque. People at the barbeque were drinking. We don't really know how much. *We know what the defendant said. But it's impossible to believe what he said*. Very, very selective memory. Remembers things that help him, ostensibly would help him. Forgets everything else, conveniently. Remembers, apparently, exactly how much he had to drink in terms of tequila. (Italics added.)

"Counsel for Mr. Lopez, defendant Lopez said well, everyone's intoxicated in this case. Everyone? Kim wasn't intoxicated. There's no evidence of that. There's speculation that you've heard in closing argument because she testified that she sipped a few beers at the party. Well, there's no evidence that she guzzled the beers at the party or that she was drunk. KC, not intoxicated. Damon Gault, not intoxicated at all. Remember the heart transplant. Chris Barragan drove over there, not intoxicated. Jason Barragan drove over there, not intoxicated. And Mickey Neely, (PH) the bouncer across the street, remember he said it was all pretty quiet except for the music from the club, he wasn't intoxicated. So not everybody was intoxicated. *Frankly the evidence as to*

intoxication as to Lopez, Jr. and Whiterock is pretty weak. You couldn't convict him of a DUI based on this evidence." (Italics added.)

Lopez argues that because the trial court prevented Dr. Pittel from testifying that Lopez had a blood-alcohol level of at least 0.30 at the time of the shooting on the prosecution's motion, due process precluded the prosecutor from then asking the jury to convict based on a lack of evidence that Lopez was intoxicated. Lopez's trial counsel did not object to the alleged misconduct, thereby forfeiting his claim of error, but because he also argues that his trial counsel was ineffective in failing to make such an objection we will consider the merits of his argument. (See *People v. Clark* (2011) 52 Cal.4th 856, 960.)

We think these comments by the prosecutor were well within his "wide latitude to vigorously argue his or her case and to make fair comment upon the evidence, including reasonable inferences or deductions that may be drawn from the evidence." (*People v. Dykes* (2009) 46 Cal.4th 731, 768.) In context, the prosecutor was not calling attention to the fact that Lopez did not introduce evidence of his blood-alcohol level at the time of the shooting, but simply observing in passing Lopez did not have his blood-alcohol level measured as Toste did because he fled the scene before the police arrived. The other two challenged comments noted the evidence of Lopez's intoxication depended heavily on his own account of how much he had had to drink on the day of the shooting and argued that evidence deserved little weight because Lopez lacked credibility. Together, these comments were entirely within the prosecutor's "wide latitude" to comment on the evidence and the credibility of the defendant. (*Ibid*.; see *People v. Martinez* (2010) 47 Cal.4th 911, 958 ["A prosecutor may comment upon the credibility of witnesses based on facts contained in the record, and any reasonable inferences that can be drawn from them"].) Because we conclude there was no misconduct, Lopez's trial counsel was not ineffective in failing to object. (See *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1092.)

IV. *The Trial Court Did Not Err in Failing to Give an Instruction Relating the Intoxication Evidence to Heat of Passion and Imperfect Self-Defense Theories of Voluntary Manslaughter*

Lopez argues the trial court erred when it gave the standard instruction on the use of voluntary intoxication evidence, because that instruction precluded the jury from considering intoxication evidence as relevant to his imperfect self-defense and heat of passion theories of voluntary manslaughter. The court instructed pursuant to CALJIC No. 625 as follows:

"You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill, or the defendant acted with deliberation and premeditation, or the defendant acted with the intent to assist, further, or promote criminal conduct by gang members, or defendant, Whiterock intended that Joseph Kenneth Lopez, Jr., avoided or escaped arrest, trial, conviction, or punishment. [¶] A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect. [¶] You may not consider evidence of voluntary intoxication for any other purpose."

Lopez contends that this instruction was erroneous because evidence of his voluntary intoxication was relevant to additional issues beyond whether he "acted with an intent to kill," namely, the subjective elements of the heat of passion and imperfect self-defense theories of voluntary manslaughter. We briefly review some background principles on murder, voluntary manslaughter, and intoxication evidence.

A. Background Legal Principles

First degree murder is an unlawful killing with malice aforethought, premeditation, and deliberation. (*People v. Chun* (2009) 45 Cal.4th 1172, 1181.) Second degree murder is an unlawful killing with malice, but without the elements of premeditation and deliberation. (*Ibid*.) Malice may be express (intent to kill) or implied (intentional commission of life-threatening act with conscious disregard for life). (*Ibid*.)

To reduce the offense to second degree murder, premeditation and deliberation may be negated by intoxication or by heat of passion from provocation. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1306; see *People v. Hughes* (2002) 27 Cal.4th 287, 342.)

Even when a defendant has the intent to kill or conscious disregard for life, a homicide may be further reduced to voluntary manslaughter in limited, explicitly defined circumstances that are viewed as negating malice. (*People v. Moye* (2009) 47 Cal.4th 537, 549 (*Moye*); *People v. Lasko* (2000) 23 Cal.4th 101, 107–109.) For voluntary manslaughter, malice is deemed to be negated by the defendant's (1) heat of passion arising from provocation that would cause a reasonable person to react with deadly passion, or (2) unreasonable but good faith belief in the need to act in self-defense (imperfect self-defense). (*People v. Lasko*, *supra*, at pp. 107–109.) Under these two limited circumstances, voluntary manslaughter negates malice even though the lethal act was committed with the intent to kill or conscious disregard for life that otherwise establishes malice. (See *People v. Bryant* (2013) 56 Cal.4th 959, 968–970; *People v. Rios* (2000) 23 Cal.4th 450, 460–461, 467.)

Heat of passion for voluntary manslaughter has both a subjective and objective component: (1) the defendant must have killed while actually in the heat of passion induced by the provocation, and (2) the provocative conduct must be such that a reasonable person would have reacted rashly or without due deliberation and reflection. (*Moye*, *supra*, 47 Cal.4th at pp. 549–550.)

In the context of a murder charge, evidence of voluntary intoxication "is admissible solely on the issue of . . . whether the defendant premeditated, deliberated, or harbored express malice aforethought." (§ 29.4, subd. (b); see, e.g., *People v. Martin* (2000) 78 Cal.App.4th 1107, 1113–1114.) Voluntary intoxication is inadmissible to negate implied malice. (*People v. Martin*, *supra*, 78 Cal.App.4th at p. 1114.) Intoxication is also irrelevant to the objective component of heat of passion; i.e., voluntary manslaughter heat of passion arises when " 'an average, *sober* person would be so inflamed that he or she would lose reason and judgment.' " (*People v. Manriquez*

(2005) 37 Cal.4th 547, 586, italics added; see *People v. Steele* (2002) 27 Cal.4th 1230, 1253; *People v. Oropeza* (2007) 151 Cal.App.4th 73, 83.)

B. Intoxication Evidence Instructions

Lopez argues that the trial court erred in instructing the jury that intoxication evidence could be considered in determining whether he "acted with the intent to kill" and not "for any other purpose," because the jury should also have been permitted to consider intoxication on the issues of (1) whether he was *subjectively* provoked for heat of passion voluntary manslaughter, and (2) whether he *actually* believed his father was in imminent danger and that he needed to use deadly force for imperfect self-defense voluntary manslaughter. These issues are not included in "deciding whether the defendant acted with an intent to kill" because, as discussed above, under these two theories malice is negated even though the defendant acted with the intent to kill or conscious disregard for life. (See *People v. Bryant*, *supra*, 56 Cal.4th at p. 968–970; *People v. Rios*, *supra*, 23 Cal.4th at pp. 460–461, 467.)

In support of his argument that intoxication is relevant to heat of passion and imperfect self-defense, Lopez relies on *People v. Cameron* (1994) 30 Cal.App.4th 591 (*Cameron*), which held, based on former Penal Code section 22 and *People v. Whitfield* (1994) 7 Cal.4th 437 (*Whitfield*), that the trial court erred by giving a jury instruction that implied voluntary intoxication could not be considered in finding a defendant guilty of second degree murder under a theory of implied malice. (See *Cameron*, at p. 601 ["Proof of intoxication tends to support a claim of honest but mistaken belief in an imminent aggravated assault, providing a reason to account for the defendant's objectively unreasonable belief [in the need to defend himself]"].)[6] However, in 1995, the Legislature amended section 22 to permit evidence of voluntary intoxication only as to "*express* malice aforethought" in murder cases. (See § 29.4, subd. (b), italics added.) The

[6] Former Penal Code section 22 provided: "Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged." (*Cameron*, *supra*, 30 Cal.App.4th at p. 600, fn. 3.)

1995 amendment to section 22 was specifically intended to overrule *Whitfield*. (See *People v. Mendoza* (1998) 18 Cal.4th 1114, 1133.) The People argue that since *Cameron* expressly relied on *Whitfield*, *Cameron* was likewise overruled by the 1995 amendment to section 22. We will assume arguendo that section 29.4's limitation on the admissibility of intoxication evidence to the issue of express malice does not apply to the distinct malice-negating concept arising from heat of passion and imperfect self-defense for voluntary manslaughter.[7] (See *Cameron*, at p. 601.)

Although a trial court has no sua sponte duty to instruct on intoxication, if it does provide an instruction it must do so correctly. (*People v. Pearson* (2012) 53 Cal.4th 306, 325.) In reviewing a claim the trial court's instructions were incorrect or misleading, we inquire whether there is a reasonable likelihood the jury applied the instructions in an erroneous manner. (*People v. Butler* (2010) 187 Cal.App.4th 998, 1013.) We "do not presume the jury blindly followed an instruction that was inconsistent with other correct instructions and the arguments of counsel. Rather, we view the record as a whole, and consider the instructions in context." (*People v. Mills* (2012) 55 Cal.4th 663, 680.) Any error requires reversal only if it is "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson*, *supra*, 46 Cal.2d at p. 836; see *People v. Mendoza*, *supra*, 18 Cal.4th at pp. 1134–1135.)

i. Imperfect Self-Defense

With respect to imperfect self-defense, the court's instructions expressly provided: "In evaluating the defendant's beliefs, consider all the circumstances as they were known and appeared to the defendant." (CALJIC No. 571.) The prosecutor did not argue or

[7] We note that a panel of the Sixth District recently held, in a case in which the Supreme Court has granted review, that by "preclud[ing] the jury from considering evidence of voluntary intoxication in deciding whether defendant had an honest but unreasonable belief in the need for self-defense," CALJIC No. 625 "ran afoul of Section 29.4 because the state of mind required for imperfect self-defense negates express malice, and Section 29.4 by its express terms makes voluntary intoxication admissible on the issue of express malice." (*People v. Soto* (2016) 248 Cal.App.4th 884, 898, review granted Oct. 12, 2016, S236164.)

suggest to the jury that they were prohibited from considering the intoxication evidence with respect to the subjective element of imperfect self-defense. In addition, defense counsel's closing argument repeatedly clarified to the jury that they *could* consider the intoxication evidence in evaluating the imperfect self-defense theory. Defense counsel argued that "the facts as known to [Lopez] even though he was intoxicated" showed his belief that he had to act to protect his father was reasonable, that in "evaluating [imperfect self-defense] . . . you factor in intoxication" as part of "all the circumstances," and that the intoxication evidence "go[es] to the issue of reasonableness under the circumstances" in determining whether Lopez was guilty of voluntary manslaughter. Defense counsel also argued at length that the intoxication evidence could negate the intent to kill necessary for murder and voluntary manslaughter and thus justify a conviction for involuntary manslaughter.[8] Thus, considering the "record as a whole," including the arguments of counsel, we are convinced that the jury likely understood it could consider the intoxication evidence as relevant to defendant's subjective state of mind to establish imperfect self-defense. (See *People v. Mills*, *supra*, 55 Cal.4th at p. 680.)

ii. Heat of Passion

Neither the prosecutor nor defense counsel directly referenced the heat of passion theory of voluntary manslaughter during closing argument. However, assuming that the jury erroneously thought they were precluded from considering the voluntary intoxication evidence with respect to the subjective component of Lopez's heat of passion defense, we find that reversal is unnecessary.

The only direct evidence regarding whether Lopez killed Toste while actually in the heat of passion was his testimony at trial. Lopez testified that he heard a loud "crack" or "popping noise," which he "thought was a gunshot." He then saw his father "falling,

[8] At defense counsel's request, the trial court added a statement to the instruction on involuntary manslaughter that, "If, as a result of defendant's voluntary intoxication, you have a reasonable doubt whether he formed the intent to kill, you should consider whether the People have proven the crime of involuntary manslaughter."

and he hit the ground." He saw Toste "standing in front of [his] dad, leaning forward, but he had his hand out . . . like he was pointing a gun at [his] dad." Lopez testified that he "thought [his] dad just got shot," that he "wanted to protect" his father, and that his intention in shooting Toste was to "do what [he] could do to protect [his] dad." Lopez also testified that he did not see Toste punch his father, and twice testified that he did not shoot Toste because he was mad. Thus, Lopez's testimony regarding his state of mind much more clearly supported the defense of imperfect self-defense than heat of passion, and this was the theory of the case that defense counsel repeatedly emphasized during closing argument. Given that the jury (while considering the intoxication evidence, as discussed above) rejected Lopez's claims of both reasonable and imperfect self-defense, "there was little if any independent evidence remaining to support his further claim that he killed in the heat of passion, and no direct testimonial evidence from defendant himself to support an inference that he subjectively harbored such strong passion, or acted rashly or impulsively while under its influence for reasons unrelated to his perceived need for self-defense." (*Moye*, *supra*, 47 Cal.4th at p. 557, italics omitted; see *id*. [no prejudice from failure to instruct on heat of passion voluntary manslaughter where jury rejected claims of reasonable and imperfect self-defense].) We conclude that it is not "reasonably probable" that Lopez would have obtained a more favorable outcome at trial had the jury been explicitly instructed that it could consider the voluntary intoxication evidence with respect to the subjective element of the heat of passion theory of voluntary manslaughter. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

V. *The Trial Court's Instruction on Motive Did Not Violate Due Process*

Lopez argues that the trial court erred in giving the following instruction on motive (CALJIC No. 370):

"The People are not required to prove that a defendant had a motive to commit any of the crimes charged. In reaching your verdict you may, however, consider whether the defendant had a motive. [¶] Having a motive may be a factor tending to show that the defendant is guilty. Not having a motive may be a factor tending to show the defendant is not guilty."

At trial, Lopez admitted he shot Toste but argued his motive was to protect his father, while the prosecution argued Lopez was motivated by anger and a desire to maintain standing in the Norteño gang by responding to a challenge from Toste. Under these circumstances, Lopez argues instructing the jury that "[h]aving a motive may be a factor to show that the defendant is guilty" amounted to an instruction on the prosecution's theory of motive, but not defendant's theory, and therefore violated due process.[9]

We do not agree there is anything misleading about this instruction. The instruction refers to a motive "to commit any of the crimes charged," not a motive to commit first or second degree murder in particular. Thus, even if the jury found Lopez was motivated by heat of passion or by an unreasonable belief that his actions were necessary to protect his father as the defense argued, they may have nonetheless concluded under the motive instruction that either of those motives "may be a factor tending to show that the defendant is guilty" of voluntary manslaughter instead of murder. In addition, CALJIC No. 370 is a correct statement of the law, and there is no dispute the jury was properly instructed on the elements of voluntary manslaughter based on heat of passion and imperfect defense of another. (See *People v. Anderson* (2007) 152 Cal.App.4th 919, 942.) During closing argument, defense counsel explained how Lopez's intent related to the crimes of first and second degree murder and voluntary manslaughter based on heat of passion or imperfect defense of others. Considering the instruction as well as the record a whole, we reject Lopez's argument that the motive instruction improperly favored the prosecution's theory of the case.

VI. *Lopez's Street Gang Conviction Is Supported by Sufficient Evidence*

Lopez next argues there is insufficient evidence to sustain his conviction under section 186.22, subdivision (a) (count 2) for participation in a criminal street gang.

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[9] Trial counsel did not object to the instruction, and in fact stated, "I don't have any strong feelings one way or the other to that instruction." Nevertheless, we conclude there was no error.

Section 186.22, subdivision (a) requires proof that: "1. The defendant actively participated in a criminal street gang; [¶] 2. When the defendant participated in the gang, [he] knew that members of the gang engage in or have engaged in a pattern of criminal gang activity; [and] [¶] 3. The defendant willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang . . . ." (CALJIC No. 1400.) In this case, the jury was instructed that "felonious criminal conduct" "means committing or attempting to commit the following crime: murder, assault by means of force likely to produce great bodily injury, accessory to murder, or illegal possession of a firearm." Lopez concedes that the jury could have found the first two elements of the offense satisfied, but argues that there was insufficient evidence that he "willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang."

We are not persuaded. The jury was instructed on the elements of assault, and was further instructed that "felonious criminal conduct" for the purposes of section 186.22, subdivision (a) included assault by means of force likely to produce great bodily injury. There was evidence at trial that Lopez, Lopez, Sr., and Lopez-Granados were members of the Norteño gang. There was also testimony that these men and Lopez himself surrounded Griffin and Barragan, made inappropriate sexual comments, pushed the women, and grabbed their hair and buttocks. As the confrontation escalated, Lopez, Sr. threw Barragan to the ground and attempted to punch Toste. In addition, the jury could properly have relied on Officer Collord's testimony in concluding Lopez "willfully assisted, furthered, or promoted" the assault. (See *People v. Ferraez* (2003) 112 Cal.App.4th 925, 930 ["It is well settled that expert testimony about gang culture and habits is the type of evidence a jury may rely on to reach a verdict on a gang-related offense or a finding on a gang allegation"].) In short, there was sufficient evidence from which the jury could conclude that Norteño gang members were committing an assault and that Lopez shot Toste in order to "assist, further, or promote" that assault.

VII. *No Cumulative Error*

Finally, Lopez argues the cumulative effect of the alleged errors at his trial requires reversal of his conviction, even if none alone were individually prejudicial. As

we have found no substantial error in any respect, this argument must be rejected. (See *People v. Butler* (2009) 46 Cal.4th 847, 885.)

DISPOSITION

The judgment is affirmed.

_____
REARDON, J.

We concur:

_____
RUVOLO, P. J.

_____
RIVERA, J.